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FIRST FEDERAL BANK OF CALIFORNIA

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

DANIEL MONTANO, an individual, and ANNIE MONTANO, an individual,

Plaintiffs,

v.

WORLD WIDE CREDIT CORPORATION, a corporation; FIRST FEDERAL BANK OF CALIFORNIA, a National Bank; SAM SMARGON, an individual; RON FEINBERG, an individual; and DOES 1 through 20, inclusive,

Defendants.

CASE NO. 08 CV 1183 JM (RBB)

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED

Date: August 22, 2008
Time: 1:30 p.m.
Ctrm.: 16

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AUTHORITIES

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I.

INTRODUCTION

The bulk of the allegations by Daniel Montano and Annie Montano (hereinafter collectively referred to as "Plaintiffs") focus on the alleged wrongdoings by World Wide Credit Corporation and its agents (hereinafter collectively referred to as "World Wide") and not First Federal Bank of California ("First Federal"). As set forth in further detail below, the Plaintiffs are legally responsible for any such wrongdoings. This is due to the fact that California law provides that the loan broker is the agent of the borrower, and not the lender. Therefore, the Plaintiffs have essentially admitted that they are liable for the wrongdoings of World Wide, and not First Federal. Further, although there are broad statements that First Federal engaged in unfair and deceptive business practices, no particulars are discussed. The only specific acts involve World Wide and, by virtue of the law, the Plaintiffs have admitted that those wrongdoings are their responsibility.

II.

SUMMARY OF ARGUMENT

1. First Federal is not a "debt collector" under the Fair Debt Collection Practices Act ("FDCPA"). As a result, the FDCPA is not applicable to First Federal and this claim must fail.

2. Plaintiffs fail to state facts upon which a claim under the Rosenthal Act can be made. Specifically, none of the acts alleged by Plaintiffs are prohibited by the Act.

3. There is no fiduciary relationship between First Federal and Plaintiffs. Specifically, the relationship between a lender and a borrower is that of a debtor-creditor. As a result, the claim of constructive fraud must fail.

4. World Wide is the agent of the Plaintiffs. As a result, the Plaintiffs are legally responsible for the alleged wrong acts committed by World Wide and their agents.

5. The implied covenant of good faith and fair dealing is limited to assuring compliance with the express terms of the contract, and cannot be extended to create obligations not contemplated by the contract. First Federal can legally enforce its

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contractual rights and has no duty to negotiate a modification.

6. First Federal is legally entitled to foreclose on the property. Specifically, the Plaintiffs admit that they are in monetary default of the loan.

7. First Federal is a federally regulated savings bank. Therefore, Plaintiffs' statutory and common law claims based upon the loan servicing practices of First Federal are completely preempted by the Home Owners' Loan Act ("HOLA") and the regulations issued thereunder by the Office of Thrift Supervision (the "OTS"). As a result, all state law claims must be dismissed

8. There is no factual basis for the punitive damage claim.

III.

FIRST FEDERAL IS NOT A "DEBT COLLECTOR" UNDER THE FDCPA

Under the FDCPA, "debt collector" is defined as follows:

> "The term 'debt collector' means any person who uses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is the collection of any debts, or who regularly collects or attempts to collect, directly or indirectly, <u>debts owed or due or asserted to be owed or due another</u>… The term includes any creditor who, in the process of collecting his own debts, uses any name other than his own which would indicate that a third person is collecting or attempting to collect such debts." (15 U.S.C. § 1692(a)(6); emphasis added)

"Creditors who collect in their own name and whose principal business is not debt collection, therefore, are <u>not subject to the Act</u>. This is consistent with the FDCPA's stated purpose of 'eliminating abusive debt collection practices by debt collectors'." (<u>Aubert v. American General Finance, Inc.</u> (7th Cir. 1998) 137 F.3d 976, 978; emphasis added.)

By Plaintiffs' own words, they were the ones to first contact First Federal to request debt relief and a workout on their loan. (First Amended Complaint ["FAC"], p. 6, ll. 16-17.) Each subsequent contact alleged by Plaintiffs was in furtherance of the loan <u>modification request made by the Plaintiffs</u>, not for debt collection. (FAC, p. 6, ll. 18-19, 24-28, p. 7, ll. 5-6, 10-11, 15-16, 22-28.) Furthermore, even assuming *arguendo* the communications between First Federal and Plaintiffs were for the collection of a debt, since <u>First Federal was merely attempting to collect on a debt owed to it, and not a third</u>

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party, it still is not a "debt collector" as defined under the statute. Finally, the principal business of First Federal is to operate a bank, not collect debts. As a result, it is not a "debt collector" under the FDCPA.

IV.

WORLDWIDE IS THE AGENT OF THE PLAINTIFFS

A mortgage loan broker is customarily retained by a borrower to act as the borrower's agent in negotiating an acceptable loan. (Wyatt v. Union Mortgage Company (1979) 24 Cal.3d 773, 782.)[1] Further, the test of an agency relationship is the principal's right to control the activities of the agent. McCollum v. Friendly Hills Travel Center (1985) 172 Cal.App.3d 83, 91.) Here, the Plaintiffs selected World Wide to act as their agent. (FAC, p. 5, ¶ 22.) In fact, World Wide assisted them in preparing loan applications, assembling financial information and communicating with potential lenders. (FAC, p. 5, ¶¶ 23, 26, 31, 35.) World Wide also negotiated the terms of the loan with First Federal on behalf of the Plaintiffs and assisted in the consummation of the loan. (FAC, p. 5, ¶ 23.) Further, World Wide was paid for its services through money paid by the Plaintiffs. The facts make it very clear that it was the Plaintiffs who both selected and controlled World Wide (and not First Federal). Specifically, the Plaintiffs contacted and hired World Wide (FAC, p. 5, ¶ 22); the Plaintiffs could have fired World Wide; World Wide assisted the Plaintiffs in preparing documents and submitting them to lenders (FAC, p. 5, l. 28); World Wide assisted the Plaintiffs in selecting the lender; and the Plaintiffs instructed (or could have instructed) World Wide as to how to perform. Clearly, World Wide was the agent of the Plaintiffs. As such, the Plaintiffs (and not First Federal) are

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[1] The Erie Doctrine requires federal courts when deciding on supplemental state law claims in federal question cases to apply state law as the "rule of decision." (See Schwarzer, Tashima & Wagstaffe, Cal. Practice Guide: Federal Civil Procedure Before Trial (The Rutter Group 2007) ¶ 1:121, p. 1-18, citing from 28 U.S.C. § 1652; Erie Railroad Co. v. Tompkins (1938) 304 U.S. 64, 78.) Essentially, this means that state law is applied on "substantive" issues. (Id. at 1-19.)

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responsible for any misconduct by World Wide.

Even worse, the Plaintiffs admit that they committed fraud on First Federal. Specifically, Plaintiffs allege that Sam Smargon ("Smargon") falsified Plaintiffs' income for purposes of qualifying for the loan. (FAC, p. 5, ll. 21-22.) Since Smargon is an employee of World Wide, and World Wide is an agent of Plaintiffs, Plaintiffs are liable for the falsified information submitted to First Federal.

V.

FIRST FEDERAL HAS A CONTRACTUAL RIGHT TO FORECLOSE ON THE PROPERTY

A. The Loan is in Default

Plaintiffs admit that their loan is in default. "On or about November 16, 2007, after making the first fully amortized payment on the loan, Plaintiffs had depleted their liquid assets and were unable to continue to make payments on the Loan." (FAC, p. 6, ll. 11-13; emphasis added.) In light of the default, and per the terms of the loan, First Federal was entitled to foreclose on the Property. (See Note Secured by Deed of Trust ["Note"], which is attached as Exhibit "A" to this Motion to Dismiss and incorporated by this reference.[2]) The Note specifically states that if the Borrower does not "pay the full amount of each monthly payment on the date it is due, or if [Borrower] does keep the promises [he] make[s] in this Note or the Deed of Trust securing it, [Borrower] will be in default." (Exhibit "A," p. 3, ¶ 8(c).) Furthermore, the Deed of Trust contains similar language providing that "if Borrower fails to make any payment or do any act provided in this Deed

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[2] First Federal may attach to a Rule 12(b)(6) motion documents referred to in the Complaint to show that they do not support plaintiff's claim. (See Branch v. Tunnell (9th Cir. 1994) 14 F.3d 449, 454 (overruled on other grounds in Galbraith v. County of Santa Clara (9th Cir. 2002) 307 F.3d 1119, 1127).) Furthermore, the Branch Court found that where the documents do not support plaintiff's claim, the complaint may be dismissed for failure to state a valid claim. (Branch v. Tunnell, 14 F.3d at 454.) In the present case, Plaintiffs' entire FAC is based upon the loan documents, and the alleged misrepresentations related thereto. As a result, it is proper for First Federal to attach, and for the Court to consider, this document.

of Trust, Borrower will be in default." (See Deed of Trust and Assignment of Rent ["Deed of Trust"], which is attached as Exhibit "A" to the Request for Judicial Notice ["RJN"], filed concurrently herewith and incorporated by this reference, p. 3, ¶ 11.) Also per the Deed of Trust, in the event of a default, the "Lender shall have the right, at its option, to declare an indebtedness and obligations secured hereby immediately due and payable…." (RJN, Exhibit "A," p. 4, ¶ 14.) Any modification of the Deed of Trust must be in writing and signed by the Borrower and First Federal. (RJN, Exhibit "A," p. 6, ¶ 33.)

Plaintiffs allege that First Federal both offered and refused to modify the loan. (FAC, p. 7, ¶¶ 49, 55, p. 8, ¶ 59, p. 12, ¶ 91.) Notwithstanding these contradictory allegations, the Deed of Trust provides that any modification must be in writing. However, Plaintiffs fail to neither attach nor allege that any such written modification exists.

B. First Federal Has a Contractual Right to Foreclose

The fact remains that First Federal was not obligated to modify the loan. By the terms of the Deed of Trust, once the loan was in default, First Federal was entitled to accelerate the loan. (RJN, Exhibit "A," p. 4, ¶ 14.) "Contracts are enforceable at law according to their terms. The covenant of good faith and fair dealing operates as a kind of safety valve to which judges may turn to fill gaps and qualify or limit rights and duties otherwise arising under rules of law and specific contract language. It does not impose any affirmative duty of moderation in the enforcement of legal rights." (Price v. Wells Fargo Bank (1989) 213 Cal.App.3d 465, 479; internal quotations omitted; emphasis added.) A party has a legal right to enforce its contractual rights.

VI.

FIRST FEDERAL OWES NO FIDUCIARY DUTIES TO PLAINTIFFS

As a general rule, the relationship between a bank and its depositor arising out of a general deposit is that of a debtor and creditor. (Price v. Wells Fargo Bank (1989) 213 Cal.App.3d 465, 476.) "The same principle should apply with even greater clarity to the relationship between a bank and its loan customers." (Id.) Thus, "a lender does not assume

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any obligations regarding the viability of the project or investment which is financed by the loan funds as long as the conduct of the lender is limited to the activities which customarily are associated with the lending function." (Peterson Development Co. v. Torrey Pines Bank (1991) 233 Cal.App.3d 103, 119, (quoting 4 Miller & Starr, Cal. Real Estate (2d ed. 1989) § 9.61, p. 176).) Instead, a commercial lender is entitled to pursue its own economic interests in a loan transaction (see Kruse v. Bank of America (1988) 202 Cal.App.3d 38, 67), and this right is inconsistent with the obligations of a fiduciary (see Committee on Children's Television, Inc. v. General Foods Corp. (1983) 35 Cal.3d 197 ["[B]efore a person can be charged with a fiduciary obligation, he must either knowingly undertake to act on behalf and for the benefit of another, or must enter into a relationship which imposes that undertaking as a matter of law"].)

Plaintiffs fail to allege any special relationship between them and First Federal. Moreover, Plaintiffs cannot allege any basis for a fiduciary relationship between Plaintiffs and First Federal.

VII.

ALL STATE LAW CLAIMS MUST BE DISMISSED AS FIRST FEDERAL IS FEDERALLY REGULATED AND THE FIELD IS PREEMPTED BY HOLA

Pursuant to the Supremacy Clause of the Federal Constitution (U.S. Const., Art. VI, section 2), Plaintiffs' statutory and common law claims based upon the loan servicing practices of First Federal are completely preempted by HOLA and the regulations issued thereunder by the Office of Thrift Supervision (the "OTS"). 12 U.S.C. § 1461, et seq., 12 CFR § 560.2. "[T]he federal regulations do occupy the entire field of regulation of the operation of federal savings banks." (Federal Savings and Loan Insurance Corp. v. Kidwell ("FSLIC"), (N.D. Cal. 1989) 716 F. Supp. 1315, 1317); internal citation omitted. Under HOLA, the OTS "has been given 'plenary authority' to prescribe rules and regulations for the creation and governance of federal savings and loan associations" such as First Federal. (Eureka Federal Savings and Loan Ass'n v. Kidwell (N.D. Cal. 1987) 672 F. Supp. 436, 439.) "[F]ederal common law governs the internal operation of federal

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savings and loan associations." (Ibid.) Only the OTS "may regulate or supervise the internal affairs of the defendant associations precluding any state interference." (Id. at 440; internal citation omitted.)

Unlike national banks, federal savings associations are "completely federal in nature," and "Congress made plenary, preemptive delegation to the Board to organize, incorporate, supervise and regulate, leaving no field for state supervision." (Elwert v. Pacific First Federal Sav. & Loan Ass'n of Tacoma, Washington (D.Or. 1956) 138 F. Supp. 395, 400.) In light of the "complete federalization" of federal savings associations, they are "immune from any type of control or regulation by state authority." (Ibid.) "[F]ederal law preempts the field . . . , so that any California law in the area is inapplicable to federal savings and loan associations operating within California." (Meyers v. Beverly Hills Federal Savings & Loan Ass'n (9th Cir. 1974) 499 F.2d 1145, 1147.) Further, state causes of action regarding the lending practices of federal savings associations "constitute de facto regulation because they can directly affect the conduct of bank operations." (FSLIC, supra, 716 F. Supp. at 1317.)

Plaintiffs' claims are "a subject of which [the OTS] under appellate supervision of the federal courts, has exclusive and sole jurisdiction. Our state courts have no power to interfere in the internal affairs of a federal savings and loan association. Such associations owe their existence to and are fully controlled by an agency of the executive branch of the United States . . ." (People v. Metrim Corp. (1960) 187 Cal.App.2d 289, 292-293.) "[S]ince the passage of the HOLA in 1933, OTS regulations have governed the 'powers and operations of every federal savings and loan association from its cradle to its corporate grave'." (Bank of America v. City & County of San Francisco (9th Cir. 2002) 309 F.3d 551, 558 quoting Fid. Fed. Sav. & Loan Ass'n v. de la Cuesta (1982) 458 U.S. 141, 145.) Further, "regulation of federal savings associations by the OTS has been so 'pervasive as to leave no room for state regulatory control'." (Id., quoting Conference of Fed. Sav. & Loan Ass'ns v. Stein (9th Cir. 1979) 604 F.2d 1256, 1260 , aff'd, (1980) 445 U.S. 921.)

The Office of Thrift Supervision ("OTS") has "plenary and exclusive authority . . .

to regulate all aspects of the operations of Federal savings associations . . . This exercise of the Office's authority is preemptive of any state law purporting to address the subject of the operations of a Federal savings association." (12 CFR § 545.2.) Moreover, the OTS "occupies the entire field of lending regulation for federal savings associations." (12 CFR § 560.2(a); see also 12 U.S.C. § 1701j-3; 12 CFR § 560.2(b); 12 CFR § 591.1-591.3.) Significantly, "State law" includes not only state statutes and regulations but also any ruling, order, or judicial decision. (12 CFR § 560.2(a).) As a result, HOLA preempts the field and First Federal is not subject to the restrictions of California common or statutory law. Therefore, all state law claims must be dismissed.

VIII.

PLAINTIFFS FAIL TO STATE FACTS UPON WHICH A CLAIM CAN BE MADE UNDER THE ROSENTHAL ACT

A. Civil Code section 1812.700 Does Not Apply to First Federal

In California, third-party debt collectors are required to include the notice provision set forth in California Civil Code section 1812.700, in an initial written communication with a debtor. (Cal. Civ. Code § 1812.700(a).) Plaintiffs allege that First Federal violated this provision. However, Plaintiffs fail to allege that First Federal attempted to collect any debt owed to a third party. As a result, this section is factually inapplicable and the claim should be dismissed.

B. Civil Code section 1788.17 Does Not Apply to First Federal

California Civil Code section 1788.17 incorporates the provisions of Sections 1692d to 1692j of the FDCPA and requires compliance with those provisions. However, as discussed above, the FDCPA's definition of "debt collector" does not extend to First Federal. As a result, California Civil Code section 1788.17 is factually inapplicable to First Federal.

C. Plaintiffs Fail to State Facts Upon Which a Legal Claim for Violation of 1788.17 Can Be Made

Plaintiffs allege First Federal engaged in conduct which was meant to harass,

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oppress and abuse persons in connection with collection of a debt in violation of 15 U.S.C. section 1692d. (FAC, p. 9, ¶ 68(b).) Notwithstanding the fact that California Civil Code section 1788.17 does not apply to First Federal, Plaintiffs fail to allege any facts showing that First Federal violated any of the prohibited acts under 15 U.S.C. section 1692d. In fact, as alleged, Plaintiffs had five conversations with First Federal between the periods of December 30, 2007 through June 2, 2008. (FAC, pp. 6-8.) Even assuming these conversations were for the purpose of collecting a debt (which they were not; in fact, Plaintiffs initiated contact with First Federal to request a loan modification), they still are not sufficient to be considered a violation under the statute. Although the statute does not provide a numerical definition of "repeatedly or continuously," five conversations in six months cannot be classified as a prohibited act.

Plaintiffs also allege that First Federal violated 15 U.S.C. section 1692e by using false, deceptive, or misleading representations to collect a debt. (FAC, p. 9, ¶ 68(c).) None of Plaintiffs' allegations as to First Federal fall within the enumerated list of prohibited activities, however. In addition, Plaintiffs fail to allege what acts or misrepresentations were allegedly committed by First Federal that would constitute a violation under this section.

Plaintiffs also allege that First Federal violated 15 U.S.C. section 1692(f). Again, Plaintiffs fail to identify any facts to support such a claim. Specifically, all contact alleged by Plaintiffs was initiated by Plaintiffs in an attempt to modify their loan after they went into default. Plaintiffs fail to allege that any of the contacts between First Federal and them were for collection efforts. Furthermore, since Plaintiffs admit that they are in default of the loan, First Federal is entitled to foreclose on the property per the Note and Deed of Trust.

Finally, since all of the communications alleged by Plaintiffs in their FAC were for the sole purpose of discussing a potential modification of the loan, and not for collection of debt, 15 U.S.C. section 1692(g)(a) was not triggered and does not apply here.

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IX.

PLAINTIFFS FAIL TO STATE FACTS UPON WHICH A LEGAL CLAIM CAN BE MADE AS TO FRAUD, CONSPIRACY TO DEFRAUD, AND CONSTRUCTIVE FRAUD

A. There is No Special Relationship Between Plaintiffs and First Federal Allowing for Tort Recovery

Under "traditional tort law principles, one is ordinarily not liable for the actions of another and is under no duty to protect another from harm, in the absence of a special relationship of custody or control." (Nally v. Grace Comm. Church of the Valley (1988) 47 Cal.3d 278, 293, cert. den. (1989) 490 U.S. 1007.) If the plaintiff does not and cannot show a duty owed directly to him, the action is subject to dismissal." (Banerian v. O'Malley (1974) 42 Cal.App.3d 604, 621.)

It is undisputed that Plaintiffs' relationship with First Federal involves a standard, arms' length, commercial banking transaction, breaches of which are adequately remedied by ordinary contract damages. (Mitsui Manufacturers Bank v. Superior Court (1989) 212 Cal.App.3d 726, 729, 731.) California has limited tort remedies in such cases. Where a breach is not founded upon an insurance contract, a plaintiff cannot recover in tort unless it shows that an independent duty exists between the parties or that the Legislature has acknowledged a "special relationship" which allows for tort recovery. (Freeman & Mills, Inc. v. Belcher Oil Co. (1995) 11 Cal.4th 85, 91.) "[A] special relationship analogous to that between an insurer and insured is an essential ingredient of any fact pattern which could give rise to a tort action ... Foley [v. Interactive Data Corp. (1988) 47 Cal.3d 654], impliedly if not expressly, limits the ability to recover tort damages in breach of contract situations to those where the respective positions of the contracting parties have the fiduciary characteristics of that relationship between the insurer and insured." (Mitsui, 212 Cal.App.3d at 730.) Moreover, even the loss of money due to a breach of a commercial obligation, which damages contribute to "a certain feeling of vulnerability," does not give rise to a special relationship. (Copesky v. Sup. Ct. (San Diego Nat'l Bank) (1991) 229

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Cal.App.3d at pp. 691, n.13, 692.) Accordingly, the bank-customer relationship is not a special relationship giving rise to tort claims or damages. As a result, Plaintiffs' tort claims should be dismissed.

B. Plaintiffs Fail to Allege their Fraud Allegation with the Requisite Level of Particularity

Under Federal Rules of Civil Procedure, Rule 9(b), "in alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake." Furthermore, Plaintiffs must allege sufficient facts with regard to all of the following: 1) The defendant made a representation as to a past or existing material fact; 2) The representation was false; 3) The defendant must have known that the representation was false when made [or must have made the representation recklessly without knowing whether it was true or false]; 4) The defendant made the representation with an intent to defraud the plaintiff, that is, he/she must have made the representation for the purpose of inducing the plaintiff to rely upon it and to act or to refrain from acting in reliance thereon; 5) The plaintiff was unaware of the falsity of the representation; must have acted in reliance upon the truth of the representation and must have been justified in relying upon the representation; and 6) As a result of the reliance upon the truth of the representation, the plaintiff sustained damage. (BAJI No. 12.31, (Spring ed. 2007).) "Every element of the cause of action for fraud must be alleged in the proper manner and the facts constituting the fraud must be alleged with sufficient specificity to allow defendant to understand fully the nature of the charge made." (Tarmann v. State Farm Mut. Auto. Ins. Co. (1991) 2 Cal.App.4th 153, 157.) "This particularity requirement necessitates pleading facts which show how, when, where, to whom, and by what means the representations were tendered." (Stansfield v. Starkey (1990) 220 Cal.App.3d 59, 73.) Plaintiffs fail to allege any specific facts of misrepresentation by First Federal. The FAC simply does not set forth the necessary facts or adequately explain how, when, where, to whom, and by what means First Federal allegedly provided Plaintiffs with false information in an effort to induce them to act to their detriment.

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C. Plaintiffs Fail to Meet the Elements of Constructive Fraud

Constructive fraud is a breach of duty, without an actual fraudulent intent, which gains an advantage to the person in fault, by misleading another to his prejudice. (Cal. Civ. Code § 1573.) To state a claim for constructive fraud under California law, a party must allege (1) a fiduciary or confidential relationship; (2) an act, omission or concealment involving a breach of that duty; (3) reliance; and (4) resulting damage. (Dealertrack, Inc. v. Huber (C.D. Cal. 2006) F.Supp.2d 1177.) As stated above, a borrower and a lender do not have a fiduciary relationship. Furthermore, Plaintiffs fail to allege any facts involving any breach of duty. Since all of the misrepresentations alleged in the FAC involve Plaintiffs and World Wide, Plaintiffs cannot claim that they relied upon any representations made by First Federal. As a result, this claim must fail.

D. First Federal is not Legally Capable of Committing the Tort Charged

"An alleged coconspirator must be legally capable of committing the tort charged. (Applied Equipment Corp. v. Litton Saudi Arabia Ltd. (1994) 7 Cal.4th 503, 511.) He or she must owe a duty to the plaintiff recognized by law and be potentially subject to liability for breach of that duty. (Id.) As stated above, First Federal did not owe any duty, fiduciary or otherwise, to Plaintiffs. Furthermore, any duty owed by codefendants cannot be imputed onto First Federal by virtue of a conspiracy claim. (Everest Investors 8 v. Whitehall Real Estate ld. Partnership XI (2002) 100 Cal.App.4th 1102, 1107.) As a result, the claim of conspiracy to breach fiduciary duties must fail.

X.

PLAINTIFFS FAIL TO STATE FACTS UPON WHICH A LEGAL CLAIM CAN BE MADE AS TO BREACH OF THE IMPLIED COVENANT OF GOOD FAITH AND FAIR DEALING

"The implied covenant of good faith and fair dealing is limited to assuring compliance with the express terms of the contract, and cannot be extended to create obligations not contemplated by the contract. Hence, in the absence of a specific agreement imposing an obligation of good faith bargaining, '[t]he fact that parties

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commence negotiations looking to a contract, or to amendment of an existing contract, does not by itself impose any duty on either party not to be unreasonable or not to break off negotiation, for any reason or for no reason." (1 Witkin, Summary of Cal. Law (19th ed.) Contracts § 802, p. 895, quoting from Racine & Laramie, Ltd. v. Dep't. of Parks & Recreation (1992) 11 Cal.App.4th 1026, 1034.)

On one hand, Plaintiffs allege that they accepted First Federal's offer to modify their loan. (FAC, p. 12, ll. 9-10.) However, throughout the FAC, Plaintiffs admit the exact opposite: that First Federal refused to modify their loan: "On or about February 5, 2008, First Federal employee Candace declined Plaintiffs' application for a modification of the loan, stating that Plaintiffs had too much debt." (FAC, p. 7, ll. 5-7; emphasis added.) "On May 6, 2008, First Federal wrote directly to Plaintiffs stating, 'Dear Daniel Banock [sic], First Federal Bank of California is unable to offer a modification that will effectively reduce your monthly payment to an affordable amount'." (FAC, p. 7, ll. 22-24; emphasis added.) "When Daniel stated that he had no such money, Tony refused to proceed with Plaintiffs' modification request, he stated that he would close the modification file and send the matter to the foreclosure department." (FAC, p. 8, ll. 3-5; emphasis added.)

Simply put, there was no underlying agreement by First Federal to modify the Plaintiffs' loan. Furthermore, the Deed of Trust, the contract in question, does not impose an obligation of good faith bargaining, nor require First Federal to offer a loan modification when a borrower defaults on his/her loan. "Contracts are enforceable at law according to their terms. The covenant of good faith and fair dealing operates as a kind of safety valve to which judges may turn to fill gaps and qualify or limit rights and duties otherwise arising under rules of law and specific contract language. It does not impose any affirmative duty of moderation in the enforcement of legal rights." (Price v. Wells Fargo Bank (1989) 213 Cal.App.3d 465, 479; internal quotations omitted; emphasis added.)

XI.

THERE IS NO VALID CLAIM UNDER BUSINESS AND PROFESSIONS CODE SECTION 17200

A. There is No "Unlawful" Practices Claim

As First Federal has complied with all applicable laws, there cannot be an Unfair Competition Law ("UCL") claim. "The principal defense to a UCL "unlawful" practices claim is to establish a defense to the 'borrowed' law. Numerous courts hold that this is also a defense to the UCL 'unlawful' claim." (Stern, Bus. & Prof. C. § 17200 Practice (The Rutter Group 2007) ¶ 5:140, p. 5-46.3.)

In the instant case, there is no tortious conduct or statutory violation by First Federal. Without a valid underlying claim, the UCL "unlawful" practices claim must also fail. (See Ingels v. Westwood One Broadcasting Services, Inc. (2005) 129 Cal.App.4th 1050, 1060.)

B. First Federal Did Not Participate in an "Unfair" Business Practice

Plaintiffs had reasonably available alternative sources from which they could apply for a refinance loan on their property. Courts have held that an "important defense to a charge that a business practice is unconscionable and hence, unfair, is that a consumer has reasonably available alternative source of supply." (Stern, Bus. & Prof. C. § 17200 Practice (The Rutter Group 2007) ¶ 5:140, p. 5-46.3, citing to Dean Witter Reynolds, Inc. v. Sup. Ct. (1989) 211 Cal.App.3d 758.) Since Plaintiffs cannot allege that First Federal was the only lender they could apply to, they cannot make the argument that their alleged injury could not have been avoided.

C. First Federal Did Not Participate in Any Acts that were "Likely to Mislead."

"The principal defense to the charge that a business practice is fraudulent or deception under § 17200…is that the practice…was not 'likely to mislead' anyone." (Stern, Bus. & Prof. C. § 17200 Practice (The Rutter Group 2007) ¶ 5:187, p. 5-54) Plaintiffs fail to allege any facts showing that the representations made by First Federal were "likely to mislead." In fact, Plaintiffs state repeatedly that First Federal refused their

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request for modify their loan.

XII.

THERE IS NO FACTUAL BASIS FOR THE PUNITIVE DAMAGE CLAIMS

Plaintiffs fail to plead facts justifying an award of punitive damages against First Federal. Therefore, Plaintiffs' request for punitive damages should be stricken as it is irrelevant and improper. (Woodland Production Credit Assn. v. Nicholas (1988) 201 Cal.App.3d 123, 129.)

A conscious disregard for the safety or rights of others may constitute the malice required for an award of punitive damages. However, to justify an award on this basis, the Plaintiffs must establish (and plead) that First Federal was aware of the probable injurious consequences of its conduct and that First Federal willfully and deliberately failed to avoid those consequences. (Taylor v. Superior Court (1979) 24 Cal.3d 890, 895-896.)

The sum and substance of Plaintiffs' contact with First Federal involves only the allegations contained at Paragraphs 41 through 62 of the FAC. A careful reading of these allegations demonstrates that the alleged wrongdoing involves non-deliberate or negligent conduct in the context of a contract for which punitive damages are not available as a remedy. (G.D. Searle & Co. v. Superior Court of Sacramento (1975) 49 Cal.App.3d 22, 29, holding "When non-deliberate injury is charged, allegations that the defendant's conduct was wrongful, willful, wanton, reckless or unlawful do not support a claim for exemplary damages; such allegations do not charge malice.")

The FAC alleges that First Federal purportedly represented that it would act as a fiduciary on the loan and that it was negligent in its duties. Notwithstanding the fact that First Federal does not have a fiduciary relationship with either of the Plaintiffs, none of the acts alleged by Plaintiffs reach the standard necessary for punitive damages. Furthermore, all of the "bad acts" alleged by Plaintiffs point to the wrongdoing of World Wide, not First Federal: "Smargon failed to disclose to the Plaintiffs the fact that the interest rate on Plaintiffs' loan was not fixed for five years"(FAC, p. 5, ¶ 24); "Smargon failed to disclose to the Plaintiffs the fact that each month the principal balance on Plaintiffs' loan would

increase" (FAC, p. 5, ¶ 27); "Plaintiffs allege on information and belief that Smargon falsified Plaintiffs' income for purposes of qualifying Plaintiffs for the loan" (FAC, p. 5, ¶ 31); "Feinberg, as Smargon's supervisor and broker of record, knew or should have know [sic] of Smargon's misrepresentations and failures to disclose." (FAC, p. 6, ¶ 37.)

Plaintiffs' fraud claim rests solely on their allegation that First Federal owed to them some type of duty.[3] Even assuming that was true (which it is not), none of the acts alleged by Plaintiffs demonstrates or suggests that First Federal's conduct was wicked, malevolent or verging on criminal indifference. Consequently, no basis for a punitive damage claim has been alleged and all requests for punitive damages should be stricken. (G.D. Searle & Co. v. Superior Court of Sacramento, supra, 49 Cal.App.3d 22, 31; Code Civ. Proc. §§ 431.10(b), 436(a).)

Civil Code section 3294 provides that a prayer for punitive damages must be proven with clear and convincing evidence that a defendant has been guilty of malice, oppression or fraud. In determining whether a complaint states sufficient facts to sustain punitive damages, the language must "lead the evil motion requisite to recovery of punitive damages." (Monge v. Superior Court (1986) 176 Cal.App.3d 503, 510.)

In order to warrant an award of punitive damages, the act complained of must not only be willful in the sense of intentional, but it must also be accompanied by aggravating circumstances, amounting to malice. The malice requirement is akin to criminal indifference. Mere spite or ill will is insufficient. (Tresemer v. Barke (1978) 86 Cal.App.3d 656, 668.)

Further, the "mere allegation an intentional tort was committed is not sufficient to warrant an award of punitive damages [citations]. Not only must there be circumstances of oppression, fraud or malice, but facts must be alleged in the pleading to support such a

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[3] The general rule is that a "[r]elationship between a bank and its depositor arising out of a general deposit is that of a debtor and creditor. (Price v. Wells Fargo Bank (1989) 213 Cal.App.3d 465, 476.) "The same principle should apply with even greater clarity to the relationship between a bank and its loan customers." (Id.)

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claim." (Grieves v. Superior Court (1984) 157 Cal.App.3d 159, 166, quoting G.D. Searle & Co. v. Superior Court of Sacramento (1975) 49 Cal.App.3d 22, 29.)

Plaintiffs fail to state sufficient facts or conduct which would support a claim for punitive damages, but also fail to allege any facts that would meet the standard necessary to entitle them to punitive damages. Plaintiffs also fail to state with sufficient specificity their fraud allegation. The absence of either element in this situation mandates that Plaintiffs' claim for punitive damages must fail.

XIII.

PLAINTIFFS' CLAIM OF EMOTIONAL DISTRESS FAILS TO STATE A CLAIM

A. Plaintiffs Fail to State Facts Sufficient to Constitute a Claim of Intentional Infliction of Emotional Distress

The only brief mention of emotional distress in the FAC is on page 8 in the recital of facts. It is not mentioned in the caption as a cause of action nor properly plead in the FAC. Furthermore, Plaintiffs fail to fully set forth the elements to this cause of action.

B. First Federal was Within its Rights to Protect its Economic Interest

Notwithstanding the fact that Plaintiffs fail to state a claim of intentional infliction of emotional distress, First Federal was entitled to foreclose on the Property in the protection of its economic interests. A party is not subject to liability for infliction of emotional distress when it has merely pursued its own economic interests and properly asserted its legal rights. (See Trerice v. Blue Cross of Cal. (1989) 209 Cal.App.3d 878, 885.) Here, the Plaintiffs admittedly defaulted on the loan. (FAC, p. 6, ¶ 40.) As a result, First Federal entitled to foreclosure on the Property per the Deed of Trust. (Exhibit "A" to RJN, p. 4.)

XIV.

ALL BOILERPLATE MUST BE STRICKEN

Paragraphs 1 through 10 of the FAC are purely boilerplate. They do not mention First Federal, the Plaintiffs, or any of the operative contracts between the parties. Even worse, there is no specific mention of any actual wrongdoing. Rather, the introductory

comments are merely boilerplate allegations which do not have any bearing on this lawsuit. They must be stricken for the reasons set forth herein, as well as the fact that they are not actionable as a matter of law.

XV.

CONCLUSION

For the reasons set forth above, this Motion to Dismiss should be granted.

Respectfully Submitted,

EPPORT, RICHMAN & ROBBINS, LLP

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EXHIBIT A

ARM WITH PAYRATE
NOTE SECURED BY DEED OF TRUST
Adjustable Interest Rate Loan - CODI Inc.

THIS NOTE CONTAINS PROVISIONS ALLOWING FOR CHANGES IN MY INTEREST RATE AND MY MONTHLY PAYMENT. MY MONTHLY PAYMENT INCREASES, MY PRINCIPAL BALANCE INCREASES AND MY INTEREST RATE INCREASES ARE LIMITED. THIS NOTE IS SECURED BY A SECURITY INSTRUMENT OF THE SAME DATE.

U.S. $ 358,000.00 Santa Monica, California

Loan No.: 49825148 **August 5, 2005**

858 Banock Street, Spring Valley, CA 91977

(Property Address)

1. In return for a loan that I have received, I promise to pay
THREE HUNDRED FIFTY-EIGHT THOUSAND AND 00/100
Dollars (U.S. **$ 358,000.00**) (this amount is called "principal"), plus interest, to the order of the Lender. The Lender is First Federal Bank of California, a federal savings bank, its successors and/or assignees, or anyone to whom this Note is transferred. I understand that the Lender may transfer this Note. The Lender or anyone who takes this Note by transfer and who is entitled to receive payments under this Note is called the "Note Holder."

2. INTEREST

(a) Interest Rate

Interest will be charged on the unpaid principal until the full amount of principal has been paid. I will pay interest at the yearly rate of **6.092%** . This is my initial interest rate. The interest rate I will pay may change. The interest rate provided for in this Section 2 is the rate I will pay both before and after any default described in Section 8 of this Note. Interest will be charged on the basis of a twelve-month year and a thirty-day month.

(b) Interest Change Dates

The interest rate I will pay may change on the **1st** day of **October, 2005** and on that day each month thereafter. Each date on which my interest rate could change is called an "Interest Change Date." The new rate of interest will become effective on each Interest Change Date.

(c) Interest Rate Limit

So long as I own the property securing this Note, my interest rate will never be greater than **11.050%** , or lower than **3.600%** . If this property is sold or transferred, with the prior consent of Lender as provided in Paragraph 12, the maximum interest rate will be **4.958%** percentage points above the greater of:

(i) my initial interest rate, or
(ii) my interest rate at the time of sale or transfer.

(d) The Index

Beginning with the first Interest Change Date, the interest rate will be based on an index (the "Index"). The Index is determined by the Lender based upon the average of the last twelve calendar months' most recently published monthly yields on dealer offering rates on nationally traded three-month certificates of deposit. The Lender will calculate the average by adding the twelve most recently published yields together and dividing the result by twelve, rounded to the nearest one-thousandth of one percentage point (0.001%). Information on such monthly yields on three-month certificate of deposit dealer rates is published by the Federal Reserve Board. The most recent Index figure available as of the date 15 days before each Interest Change Date is the "Current Index."

If the Index or any Index previously substituted under this Section 2(d) is no longer available, or is otherwise unpublished, or at Lender's sole discretion is determined to be substantially recalculated, the Lender may choose a new Index. The Lender will give me notice of the choice. The Lender shall next adjust the Margin set forth in Section 2(e) of this Note based upon the value of the substituted index as of the last preceding Interest Change Date on which the prior Index was available or the date of this Note, whichever occurs later, such that the sum of the substituted index and the adjusted Margin will be similar to the sum of the prior index and the Margin set forth in Section 2(e) of this Note as of such date. The most recent value of the substituted index, as announced from time to time, and such adjusted Margin shall become the Index and the Margin for purposes of Section 2 of this Note.

(e) Calculation of Interest Rate Changes

Before each Interest Rate Change Date, the Note Holder will calculate my new interest rate by adding **3.600%** percentage points (the "Margin") to the Current Index. Subject to the limit in Section 2(c), this amount will by my new interest rate until the next Interest Change Date.

3. PAYMENTS

(a) Time and Place of Payments

I will pay principal and interest by making payments every month.

I will make my monthly payments on the first day of each month beginning on **October 1, 2005**. I will make these payments every month until I have paid all of the principal and interest and any other charges described below that I may owe under this Note. My monthly payments will be applied to interest before principal. If, on **September 1, 2045,** I still owe amounts under this Note, I will pay those amounts in full on that date, which is called the "maturity date."

I will make my monthly payments at 401 Wilshire Boulevard, Santa Monica, California 90401, or at a different place if required by the Note Holder. Principal, interest and charges are payable in lawful money of the United States.

RIDER TO NOTE SECURED BY DEED OF TRUST - PREPAYMENT PENALTY RIDER

OWNER OCCUPANCY RIDER ATTACHED HERETO AND MADE A PART HEREOF

I certify this to be a true and correct copy of the original document
FIDELITY NATIONAL TITLE CO.
By:

EXHIBIT A
PAGE 19

(b) Amount of My Initial Monthly Payments

Each of my initial monthly payments will be in the amount of

NINE HUNDRED TWENTY-TWO AND 25/100

Dollars (U.S. $ 922.25). This amount may change.

My initial monthly payment may not constitute a "full payment" at the interest rate shown in paragraph 2 above. My initial monthly payment is calculated based on a payment rate of 1.100% . This lower payment amount will not reflect the actual interest rate that is being charged on my Note.

(c) Payment Change Dates

My monthly payment may change as required by Section 3(d) below beginning on the 1st day of **October, 2006**, and on that day every twelfth (12th) month thereafter. Each of these dates is called a "Payment Change Date." My monthly payment will also change at any time Sections 3(f) or 3(g) below requires me to pay the Full Payment.

I will pay the amount of my new monthly payment each month beginning on each Payment Change Date or as provided in Sections 3(f) or 3(g) below.

(d) Calculation of Monthly Payment Changes

At least 25 days but not more than 120 days before each Payment Change Date, the Note Holder will calculate the amount of the monthly payment that would be sufficient to repay the remaining unpaid principal in full on the maturity date in substantially equal installments at the interest rate effective during the month preceding the Payment Change Date. The result of this calculation is called the "Full Payment." The Note Holder will then calculate the amount of my monthly payment due the month preceding the Payment Change Date multiplied by the number 1.075 in the event the Full Payment is greater than such monthly payment. The result of this calculation is called the "Limited Payment." Unless Sections 3(f) or 3(g) below requires me to pay a different amount, I will pay the Limited Payment.

(e) Additions / Reductions to My Unpaid Principal

My monthly payment could be less than the amount of the interest portion of the monthly payment that would be sufficient at the monthly payment date to repay the unpaid principal in full on the maturity date in substantially equal payments. If so, each month that my monthly payment is less than the interest portion, the Note Holder will subtract the amount of my monthly payment from the amount of the interest portion and will add the difference to my unpaid principal. The Note Holder will also charge interest on the amount of this difference. The interest rate on the interest added to principal will be the rate required by Section 2 above.

My monthly payment could also be greater than the amount necessary to repay the principal in full on the maturity date in substantially equal payments. In that case, the Note Holder will subtract the amount of the interest portion of the monthly payment from the amount of the monthly payment and will then subtract this difference from the unpaid principal.

(f) Limit on My Unpaid Principal; Increased Monthly Payment.

My unpaid principal can never exceed a maximum amount equal to **ONE HUNDRED TEN AND 00/100 (110.00%)** of the principal amount I originally borrowed. My unpaid principal could exceed that maximum amount due to the Limited Payments and /or interest rate increases. If so, on the date that my paying my monthly payment would cause me to exceed that limit, I will instead pay a new monthly payment. The new monthly payment will be in an amount which would be sufficient to repay my then unpaid principal in full on the maturity date at my current interest rate in substantially equal payments. At this time I will not have the option of paying the Limited Payment.

(g) Required Full Payment

On **October 1, 2010**, and on the same day every five years thereafter, I will begin paying the Full Payment as my monthly payment until my monthly payment changes again. At this time I will not have the option of paying the Limited Payment. I will also begin the Full Payment as my monthly payment on the final Payment Change Date.

4. NOTICES OF CHANGES

The Note Holder will deliver or mail to me a notice of any changes in the amount of my monthly payment at least 25 days before the effective date of any change. The notice will contain the new interest rate and/or the payment amount applicable to my loan. The notice will also include information required by law to be given to me and also the title and telephone number of a person who will answer any questions I may have regarding the notice.

5. BORROWER'S RIGHT TO PREPAY

I have the right to make payments of principal at any time before they are due. A payment of principal only is known as a "prepayment." When I make a prepayment, I will tell the Note Holder in writing that I am doing so.

I may make a full prepayment or partial prepayments, without paying any prepayment charge. The Note Holder may require that any partial prepayments be made on the date monthly payments are due and be in the amount of that whole part of one or more monthly payments which would be applied towards principal. If I make a partial prepayment, there will be no changes in the amount or due dates of my monthly payments unless the Note Holder agrees in writing to those changes. My partial prepayment may reduce the amount of my monthly payments after the first Payment Change Date following my partial prepayment. However, any reduction due to my partial prepayment may be offset by an interest rate increase.

6. LOAN CHARGES

If a law, which applies to this loan and which sets maximum loan charges, is finally interpreted so that the interest or other loan charges collected or to be collected in connection with this loan exceed the permitted limits, then any such loan charge shall be reduced by the amount necessary to reduce the charge to the permitted limits.

EXHIBIT A

7. LEGISLATION AFFECTING LENDER'S RIGHT

If enactment or expiration of applicable laws or regulation has the effect of rendering any provision of the Note or Deed of Trust relating to payment of interest or principal, defaults, or transfer of the property unenforceable according to its terms, the Note Holder, at its option, may require immediate payment in full of all sums secured by the Deed of Trust and may invoke any remedies permitted herein.

8. BORROWER'S FAILURE TO PAY AS REQUIRED

(a) Late Charges for Overdue Payments

If the Note Holder has not received the full amount of any monthly payment by the end of fifteen calendar days after the date it is due, I will pay a late charge to the Note Holder. The amount of the charge will be six percent of my overdue payment of principal and interest. I will pay this late charge promptly but only once on each late payment.

(b) Accrual of Interest on Unpaid Balance

In addition to any late charge described above and at the option of the Note Holder, all accrued interest which is not paid when due shall also bear interest at the same rate as the interest on the unpaid principal balance.

(c) Default

If I do not pay the full amount of each monthly payment on the date it is due, or if I do not keep the promises I make in this Note or the Deed of Trust securing it, I will be in default.

(d) Notice of Default

If I am in default, the Note Holder may send me a written notice telling me that if I do not correct the default by a certain date, the Note Holder may require me to pay immediately the full amount of principal which has not been paid and all the interest that I owe on that amount.

(e) No Waiver by Note Holder

Even if, at a time when I am in default, the Note Holder does not require me to pay immediately in full as described above, the Note Holder will still have the right to do so if I am in default at a later time.

(f) Payment of Note Holder's Costs and Expenses

If the Note Holder has required me to pay immediately in full as described above, the Note Holder will have the right to be paid back by me for all of its costs and expenses in enforcing this Note to the extent not prohibited by applicable law. Such expenses include for example, reasonable attorneys' fees.

9. GIVING OF NOTICES

Unless applicable law requires a different method, any notice that must be given to me under this Note will be given by delivering it or by mailing it by first class mail to me at the Property Address above or a different address if I give the Note Holder a notice of my different address.

Any notice that must be given to the Note Holder under this Note will be given by mailing it by first class mail to the Note Holder at the address stated in Section 3(a) above or at a different address if I am given a notice of that different address.

10. OBLIGATIONS OF PERSONS UNDER THIS NOTE

If more than one person signs this Note, each person is fully obligated to keep all of the promises made in this Note, including the promise to pay the full amount owed. Any person who is a guarantor, surety or endorser of this Note is also obligated to do these things. Any person who takes over these obligations, including the obligations of a guarantor, surety or endorser of this Note, is also obligated to keep all of the promises made in this Note. The Note Holder may enforce its rights under this Note against each person individually or against all of us together. This means that any one of us may be required to pay all of the amounts owed under this Note.

11. WAIVERS

I and any other person who has obligations under this Note waive the rights of presentment and notice of dishonor. "Presentment" means the right to require the Note Holder to demand payment of amounts due. "Notice of dishonor" means the right to require the Note Holder to give notice to other persons that amounts due have not been paid.

12. SECURITY

The Note is secured by a Deed of Trust dated the same date as this Note, and said Deed of Trust contains the following clause, which is incorporated herein: **"Assumptions.** During the term of the Note, the Lender shall not exercise its right to declare all sums due, as provided in paragraph 14 of this Deed of Trust, in the event of the sale or transfer of the Property to a credit worthy buyer so long as such buyer applies for the assumption of the loan in advance of accepting title to the Property, and so long as the buyer, in the Lender's sole and absolute judgment, qualifies for the loan evidenced by the Note, executes an assumption agreement acceptable to Lender, and pays Lender any fees required by Lender assessed in connection with an assumption; and so long as the loan is current and the Property qualifies for the loan at the same or lower loan to value ratio than the original loan balance bore to the then fair market value of the Property. The Note may not be assumed unless the legal and beneficial title to the Property has at all times remained with Borrower."

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13. CLERICAL ERRORS

In the event that the Lender at any time discovers that this Note or the Deed of Trust or any other document related to this loan (the "Loan Documents") contains an error which was caused by a clerical mistake, calculation error, computer error, printing error or similar error, I agree, upon notice from the Lender to re-execute any Loan Documents that are necessary to correct any such error(s) and I also agree that I will not hold the Lender responsible for any damage to me which may result from any such error.

14. LOST, STOLEN OR MUTILATED DOCUMENTS

If any of the Loan Documents are lost, stolen, mutilated or destroyed and the Lender delivers to me an indemnification in my favor, signed by the Lender, then I will sign and deliver to the Lender a Loan Document identical in form and content which will have the effect of the original for all purposes.

BORROWER(S):

Daniel E. Montano

Annie Montano

Annie Montano

DO NOT DESTROY THIS NOTE: When paid, this Note, with the Deed of Trust securing it, must be surrendered to Trustee for cancellation before reconveyance will be made.

EXHIBIT A

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FIRST FEDERAL BANK
OF CALIFORNIA
Corporate Office
401 Wilshire Boulevard
Santa Monica, CA 90401-9490

›an No.: 49825148

PREPAYMENT CHARGE RIDER TO NOTE SECURED BY DEED OF TRUST

This Rider is attached to and made part of that certain Note Secured by Deed of Trust (the "Note") dated **August 5, 2005** by and between

Daniel E. Montano and Annie Montano, husband and wife as joint tenants

("Borrower"), and FIRST FEDERAL BANK OF CALIFORNIA, ("Lender" or "Note Holder"). All terms used herein shall have the meanings ascribed to such terms in the Note. To the extent the provisions contained herein conflict with any provision contained in the Note, the provisions hereof shall control.

1. Paragraph 5 of the Note is hereby modified in its entirety to read as follows:

"5. BORROWER'S RIGHT TO REPAY

I have the right to make payments of principal at any time before they are due. A payment of principal only is known as a "prepayment." When I make a prepayment, I will tell the Note Holder in writing that I am doing so. I may make a full prepayment or partial prepayments.

Over the first three Loan Years, I may prepay an aggregate amount not exceeding **$ 71,600.00** (20 percent of the original loan amount; the "Permitted Prepayment") without penalty. During the first three Loan Years, if I prepay an amount in excess of the Permitted Prepayment, I will pay to the Note Holder a prepayment charge pursuant to the following schedule:

FIRST LOAN YEAR: **$ 7,160.00**

SECOND LOAN YEAR: **$ 4,773.33**

THIRD LOAN YEAR: **$ 2,386.67**

After completion of the third Loan Year, there will be no prepayment charges for any full or partial prepayments. As used in this Note, "Loan Year" means each year during the term of this Note commencing thirty days before the first payment due date.

The prepayment charge shall be payable upon a prepayment as set forth above, whether voluntary or involuntary, including but not limited to a prepayment resulting from the Note Holder's permitted acceleration of the balance due on the Note. Notwithstanding the foregoing, nothing herein shall restrict my right to prepay at any time without penalty, accrued but unpaid interest that has been added to principal.

The Note Holder may require that any partial prepayments be made on the date monthly payments are due and be in the amount of one or more monthly payments.which would be applied towards principal. Any partial prepayment of principal shall be applied to interest accrued on the amount prepaid and then to the principal balance of the Note which shall not relieve me of the obligation to make the installments each and every month until the Note is paid in full. If I make a partial prepayment, there will be no changes in the amount or due dates of my monthly payments unless the Note Holder agrees in writing to those changes. My partial prepayment may reduce the amount of my monthly payments after the first Payment Change Date following my partial prepayment. However, any reduction due to my partial prepayment may be offset by an interest rate increase."

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2. Other than as expressly modified herein, the provisions of the Note shall remain in full force and effect, according to their terms.

BORROWER(S):

Daniel E. Montano

Annie Montano

Annie Montano

EXHIBIT A

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FIRST FEDERAL BANK OF CALIFORNIA
401 Wilshire Boulevard, Santa Monica, California 90401

OWNER-OCCUPANCY RIDER TO NOTE SECURED BY DEED OF TRUST

Loan No. 49825148 Date: **August 5, 2005**

FOR VALUE RECEIVED, the undersigned (the "Borrower" or "Trustor") agrees that the following provisions shall be incorporated into that certain note (the "Note") of even date executed by the Borrower, in favor of First Federal Bank of California (the "Lender" or "Beneficiary"), as beneficiary, which Note is secured by a deed of trust (the "Deed of Trust") of even date. To the extent that the provisions of this Rider are inconsistent with the provisions of the Note or Deed of Trust , the provisions of this Rider shall prevail and shall supersede any such inconsistent provisions of the Note or Deed of Trust .

1. OWNER OCCUPANCY

As an inducement for Lender to make the loan secured by the Deed of Trust, Borrower has represented to Lender that the Property will be occupied, within ninety days of the date of recording of the Deed of Trust, as the Borrower's personal residence, and will not be used as investment property (i.e. the Property will be "owner-occupied"), unless extenuating circumstances exist which are beyond Borrower's control and as to which Borrower notifies Lender in writing. Borrower acknowledges that Lender would not have agreed to make the loan if the Property were not to be owner-occupied and that the interest rate set forth on the face of the Note and other terms of the loan were determined as a result of the Borrower's representation that the Property would be owner-occupied. Borrower further acknowledges that, among other things, purchasers of loans (including agencies, associations and corporations created by the federal and state government for the purchase of loans) typically require that properties securing loans acquired by such purchasers be owner-occupied, and will reject loans for which the security properties are not owner-occupied; Lender's ability to sell a loan or an interest in a loan (which it often does in the ordinary course of business) will be impaired where a security property is not owner-occupied; the risks involved and the costs of holding and administering a loan are often higher in the case of a loan where the security property is not owner-occupied; and, if and when Lender makes a loan on non-owner-occupied property, Lender typically makes such a loan on terms different from those of loans secured by owner-occupied properties.

In order to provide Lender with evidence of the owner-occupancy of the Property, the Borrower agrees to provide Lender with documentation reasonably requested by Lender for the purpose of verification of owner-occupancy. This documentation may include, but is not limited to, utility bills, copies of the Borrower's most recent telephone billing statement and any tax return schedules showing investment property owned by the Borrower. Such documentation shall assist Lender in verifying owner-occupancy, but shall not in itself be deemed proof of owner-occupancy if, in Lender's judgment, other evidence indicates that the Property is not occupied by the Borrower.

Accordingly, in the event the Property is not occupied, within the applicable time described above, as a personal residence of the Borrower, or the Borrower fails to provide the documentation required hereunder in a timely manner, the Lender may, at its option, do the following:

A. If at such time the loan meets the Lender's normal requirements as to loan-to-value ratio, property type, etc. for a loan secured by non-owner occupied property, the Lender may (a) permanently increase the interest rate on the Note by an additional one percent (1.00%); and (b) add one percent (1.00%) of the face amount of the Note, representing the additional loan fee, to the unpaid principal balance of the Note.

B. Alternatively, the Lender may declare all sums secured by the Deed of Trust to be immediately due and payable.

The rights of Lender hereunder shall be in addition to any other rights of Lender under the Note and Deed of Trust or allowed by law.

EXHIBIT A
PAGE 25

2. **PREPAYMENT CHARGE**

In addition to the foregoing, in the event that the Lender determines, in its sole and absolute judgment, that Borrower has failed to occupy the Property by the ninetieth day following recording of the Deed of Trust as Borrower's personal residence as described in Paragraph 1 above, a prepayment charge shall be payable thereafter in connection with any prepayment made under the Note. In such case, the prepayment charge shall be the greater of (a) the prepayment charge set forth in the Note and any Rider thereto, if any, or (b) the following prepayment charge:

A. For any prepayment made within **three years** of the date of the Note, the prepayment charge shall be the greater of: (i) one percent of the unpaid principal balance of the Note on the date of prepayment or (ii) the amount determined under the following schedule:

First Year:	Three percent of the principal amount being prepaid.
Second Year:	Two percent of the principal amount being prepaid.
Third Year:	One percent of the principal amount being prepaid.

B. If prepayment is made after such three year period, there shall be no prepayment charge due.

3. FEES OR COSTS

Any legal fees or administrative costs incurred directly or indirectly by Lender as a result of the inability to sell the loan may be added to the unpaid principal balance of the Note.

4. EFFECT OF RIDER

Except as otherwise provided in this Rider, all of the provisions of the Note and Deed of Trust shall remain in full force and effect.

In this rider, the singular shall include the plural.

Loan 49825148

IN WITNESS WHEREOF, the Borrower has executed this Rider on the 5TH day of August, 2005.

BORROWER(S):

Daniel E. Montano

Annie Montano

FUN 30064 (2003-10-31)

EXHIBIT A

PAGE 27

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PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

At the time of service, I was over 18 years of age and **not a party to this action**. I am employed in the County of Los Angeles, State of California. My business address is 1875 Century Park East, Suite 800, Los Angeles, California 90067-2512.

On July 14, 2008, I served true copies of the following document(s) described as **MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED** on the interested parties in this action as follows:

SEE ATTACHED SERVICE LIST

BY MAIL: I enclosed the document(s) in a sealed envelope or package addressed to the persons at the addresses listed in the Service List and placed the envelope for collection and mailing, following our ordinary business practices. I am readily familiar with Epport, Richman & Robbins, LLP's practice for collecting and processing correspondence for mailing. On the same day that the correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, in a sealed envelope with postage fully prepaid. I am aware that on motion of the party served, service is presumed invalid if the postal cancellation date or postage meter date is more than one day after the date of deposit for mailing as set forth in this Proof of Service.

I declare that I am employed in the office of a member of the bar of this Court, at whose direction this service was made. I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on July 14, 2008, at Los Angeles, California.

s/ Mae T. Sasina
Mae T. Sasina

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SERVICE LIST
FIRST FEDERAL BANK adv. MONTANO, et al.
Case No. 37-2008-00084613-CU-FR-CTL

Octavio Cardona-Loya, II Law Offices of Eric F. Fagan 2300 Boswell Road, Suite 211 Chula Vista, California 91914	Attorneys for Plaintiffs DANIEL MONTANO and ANNIE MONTANO
Gary Kincannon Barry Gardner & Kincannon 5000 Birch Street Suite 420 Newport Beach, California 92660	Attorneys for Defendants WORLDWIDE CREDIT CORPORATION and RON FEINBERG
Matt Rifat Manning and Marder 550 West C Street Suite 1900 San Diego, California 92101	Attorneys for Defendants WORLDWIDE CREDIT CORPORATION and RON FEINBERG

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nkang@erlaw.com

Attorneys for Defendant
FIRST FEDERAL BANK OF CALIFORNIA

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

DANIEL MONTANO, an individual, and ANNIE MONTANO, an individual,

Plaintiffs,

v.

WORLD WIDE CREDIT CORPORATION, a corporation; FIRST FEDERAL BANK OF CALIFORNIA, a National Bank; SAM SMARGON, an individual; RON FEINBERG, an individual; and DOES 1 through 20, inclusive,

Defendants.

CASE NO. 08 CV 1183 JM (RBB)

NOTICE OF MOTION AND MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED

Date: August 22, 2008
Time: 1:30 p.m.
Ctrm.: 16

EPPORT, RICHMAN & ROBBINS, LLP
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TO THE HONORABLE JEFFREY T. MILLER, U.S. DISTRICT JUDGE:

PLEASE TAKE NOTICE that on August 22, 2008, at 1:30 p.m., or as soon thereafter as the matter may be heard in Courtroom 16 of the above-captioned Court located at 940 Front Street, San Diego, California, Defendant First Federal Bank of California ("First Federal") will and does hereby move this Court to dismiss the First Amended Complaint pursuant to Federal Rules of Civil Procedure, Rule 12(b)(6).

The Motion is brought on the following grounds:

1. The First Cause of Action[1] for Violation of the Fair Debt Practices Collection Act does not apply to First Federal as First Federal is not a "debt collector" under the Act.

2. The Second Cause of Action for Breach of Fiduciary Duty and Conspiracy to Breach Fiduciary Duty fails to state facts upon which a legal claim can be made as a lender does not owe fiduciary duties to borrowers.

3. The Third Cause of Action for Fraud and Conspiracy to Defraud fails to state facts upon which a legal claim can be made as to First Federal as the essential elements are lacking.

4. The Fourth Cause of Action for Constructive Fraud fails to state facts upon which a legal claim can be made as to First Federal as the relationship between a lender and a borrower is that of a debtor and creditor; there is no fiduciary duty.

5. The Fifth Cause of Action for Breach of the Covenant of Good Faith and Fair Dealing fails to state facts upon which a legal claim can be made as to First Federal as the implied covenant is limited to assuring compliance with the express terms of the contract; it cannot be extended to create obligations not contemplated by the contract; and there is no requirement in the loan document mandating First Federal to modify its loan.

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[1] This lawsuit was originally filed in the Superior Court of the State of California for the County of San Diego and subsequently removed to federal court. Therefore, the First Amended Complaint refers to "causes of action" and not "claims for relief."

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6. The Sixth Cause of Action for Violation of the Business and Professions Code section 17200 fails to state facts upon which a legal claim can be made as to First Federal. First, since the First Amended Complaint fails to state a violation of an underlying law, the Unfair Competition Law ("UCL") fails as well. Second, Plaintiffs fail to show how any of the acts alleged in the First Amended Complaint are unfair under the UCL. Finally, none of the acts alleged by Plaintiffs were "likely to mislead" as required under the statute.

This Motion is based on this Notice of Motion and Motion, the Memorandum of Points and Authorities filed herewith, and the pleadings and papers filed herein.

EPPORT, RICHMAN & ROBBINS, LLP

By: s/ Nami R. Kang
NAMI R. KANG
Attorneys for Defendant
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PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

At the time of service, I was over 18 years of age and **not a party to this action**. I am employed in the County of Los Angeles, State of California. My business address is 1875 Century Park East, Suite 800, Los Angeles, California 90067-2512.

On July 14, 2008, I served true copies of the following document(s) described as **NOTICE OF MOTION AND MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED** on the interested parties in this action as follows:

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I declare that I am employed in the office of a member of the bar of this Court, at whose direction this service was made. I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on July 14, 2008, at Los Angeles, California.

s/ Mae T. Sasina
Mae T. Sasina

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SERVICE LIST
FIRST FEDERAL BANK adv. MONTANO, et al.
Case No. 37-2008-00084613-CU-FR-CTL

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Gary Kincannon Barry Gardner & Kincannon 5000 Birch Street Suite 420 Newport Beach, California 92660	Attorneys for Defendants WORLDWIDE CREDIT CORPORATION and RON FEINBERG
Matt Rifat Manning and Marder 550 West C Street Suite 1900 San Diego, California 92101	Attorneys for Defendants WORLDWIDE CREDIT CORPORATION and RON FEINBERG

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Attorneys for Defendant
FIRST FEDERAL BANK OF CALIFORNIA

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

DANIEL MONTANO, an individual, and ANNIE MONTANO, an individual,

Plaintiffs,

v.

WORLD WIDE CREDIT CORPORATION, a corporation; FIRST FEDERAL BANK OF CALIFORNIA, a National Bank; SAM SMARGON, an individual; RON FEINBERG, an individual; and DOES 1 through 20, inclusive,

Defendants.

CASE NO. 08 CV 1183 JM (RBB)

REQUEST FOR JUDICIAL NOTICE IN SUPPORT OF DEFENDANT FIRST FEDERAL BANK OF CALIFORNIA'S MOTION TO DISMISS PLAINTIFFS' FIRST AMENDED COMPLAINT

Date: August 22, 2008
Time: 1:30 p.m.
Crtrm.: 16

EPPORT, RICHMAN & ROBBINS, LLP
1875 CENTURY PARK EAST, SUITE 800
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Defendant First Federal Bank of California ("First Federal") hereby requests that the Court take judicial notice of the document described hereinafter pursuant to Federal Rule of Evidence 201:

A. Deed of Trust and Assignment of Rents, recorded in the Official Records, County of San Diego, on August 15, 2005 as Instrument No. 2005-0698850.

A true and correct copy of the above document is attached hereto as Exhibit "A" and is incorporated herein by this reference. This document is a public record and is pertinent to the consideration of the pending Motion to Dismiss.

EPPORT, RICHMAN & ROBBINS, LLP

By: s/ Nami R. Kang
NAMI R. KANG
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FIRST FEDERAL BANK OF CALIFORNIA
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s/Mae T. Sasina
Mae T. Sasina

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